

Memorandum 98-13

Response to Demand for Production of Documents in Discovery: Comments on Tentative Recommendation

Attached is a staff draft of a Recommendation on *Response to Demand for Production of Documents in Discovery*, which would extend the time for a response to a demand for production of documents from 20 to 30 days. We received only one communication on the Tentative Recommendation, from attorney Richard Haeussler, attached.

Comments of Richard Haeussler

Mr. Haeussler says the change from 20 to 30 days for a response to a demand for production "is probably a good idea." He says the statute should require the compliance statement by the party in possession of the requested documents to include a statement of the number or volume of documents to be produced. He gives no persuasive reason for adding such a requirement, although he says he was surprised in a case when the other party showed up with 17 boxes of documents. The staff would not include such a requirement in this proposal. We would consider this in our general discovery study as time permits.

Mr. Haeussler says the court should be able to order that documents not produced in response to the demand be excluded at trial. This is now provided in the discovery statutes, which give the court authority to prohibit a party "from introducing designated matters in evidence" for "[f]ailing to respond or submit to an authorized method of discovery." Code Civ. Proc. § 2023(a)(4), (b)(3). This appears sufficient to the staff. However, Mr. Haeussler is concerned this provision is not specific enough, and is therefore disregarded by some judges. The staff added language to the Comment to refer to Code of Civil Procedure Section 2023. Is this sufficient?

AB 1094

The Assembly Judiciary Committee's civil practice bill, AB 1094, would make the recommended change from 20 to 30 days for production of requested documents. This provision was amended into the bill last month. The bill

passed the Assembly on the consent calendar last month, and is now pending in the Senate Judiciary Committee. Because of AB 1094, no further legislative action on the recommendation is necessary. We would transmit the Commission's recommendation to the Assembly and Senate Judiciary Committees.

Staff Recommendation

The staff recommends the Commission approve the attached recommendation for printing and transmission to the Assembly and Senate Judiciary Committees.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

From: haeu@ix.netcom.com
Date: Sun, 7 Dec 1997 10:47:36 -0600 (CST)
To: comment@clrc.ca.gov
Subject: CCP 2031 Comments
MIME-Version: 1.0

CCP 2031,

the change to 30 days is probably a good idea. However, that means that the production will be at the same time as the compliance statement.

I would suggest that the compliance statement include a statement as to the approximate number of documents to be produced. I have a case now where I would not know what volume of documents the other side is producing until they walk in the door. Last time was 17 boxes.

PLEASE CONSIDER HAVING A REQUIREMENT THAT THE RESPONDING PARTY BE REQUIRED TO DISCLOSE THE AMOUNT OF THE PRODUCED DOCUMENTS

I would also look at the sanction for failure to produce the documents and later have the opposing party produce them at trial.

I would think that you would have a sub section which says that a Motion in Limine can be filed to exclude documents which have not been produced, if the documents which fit within the production are not delivered 30 days prior to trial and the responding party files a statement as to why the documents were not produced at the time of the original production.

PLEASE CONSIDER A PROCEDURE THAT IMPOSES A SANCTION FOR FAILING TO PRODUCE THE DOCUMENTS WHICH EXCLUDES THE DOCUMENT AT TRIAL

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#J-502

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Response to Demand for Production
of Documents in Discovery

March 1998

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
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SUMMARY OF RECOMMENDATION

This recommendation would extend the time for a response to a demand for production of documents in civil discovery to 30 days from the present 20 days. This will tend to reduce frequent motions or requests for an extension of time, will conform the California time period to that in Rule 34 of the Federal Rules of Civil Procedure, and will make it the same as the 30-day period in California for a response to written interrogatories and requests for admission.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

1 RESPONSE TO DEMAND FOR PRODUCTION OF
2 DOCUMENTS IN DISCOVERY

3 In discovery in a civil case, a party may demand that another party produce and
4 permit inspection and copying of a document.¹ The demand shall specify a
5 reasonable time for the inspection that is at least 30 days after service of the
6 demand.² Within 20 days after service of the demand, the other party must respond
7 in writing to each item or category of items in the demand by stating either that the
8 party will comply, that the party lacks the ability to comply, or that the party
9 objects to the demand.³

10 These provisions were enacted in 1974⁴ to replace the former procedure for
11 obtaining documents by noticed motion and court order with the present extra-
12 judicial method of simply serving a demand.⁵ The 1974 legislation brought
13 California substantially into line with the 1970 revision of Rule 34 of the Federal
14 Rules of Civil Procedure.⁶ However, in adopting a 20-day period for the written
15 response, California departed from the 30-day period in federal Rule 34.⁷

16 The Commission is informed that, when faced with a demand for production of
17 documents, parties routinely request an extension of the 20-day period for the
18 written response, often resolving the matter by agreeing with the demanding party
19 that both the response and inspection of the requested documents shall be done on
20 the same day.⁸ The result of having two different time periods — 20 days for the
21 response and a minimum of 30 days for the inspection — appears to be that
22 motions for extension are often necessary, even though the purpose of the 1974

1. Code Civ. Proc. § 2031(a).

2. Code Civ. Proc. § 2031(c).

3. Code Civ. Proc. § 2031(f), (h). Special time periods apply in unlawful detainer cases — five days after the demand for the written response, and a minimum of five days after the demand for inspection. *Id.* § 2031(c), (h). These time periods are extended for service by mail or facsimile transmission. Code Civ. Proc. §§ 2019(e), 1013; R. Weil & I. Brown, California Practice Guide, Civil Procedure Before Trial § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

4. 1974 Cal. Stat. ch. 592. The 1974 legislation permitted the demand to specify a reasonable time for inspection of the documents, with no minimum time. The minimum 30-day period for inspection was adopted in 1991, but the 20-day period for the written response was not changed. 1991 Cal. Stat. ch. 1090.

5. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975); 2 B. Witkin, California Evidence *Discovery and Production of Evidence* § 1516, at 1479 (3d ed. 1986).

6. *Id.*

7. A possible justification for having a shorter time for the response than for inspection is that the party in possession of the document may object to producing it. In such a case, a short time for the response will avoid unnecessary delay in discovery. However, the Commission believes that any possible benefit of a short response time is outweighed by the benefit in most cases of avoiding unnecessary motions for extensions of time. See generally R. Weil & I. Brown, California Practice Guide, Civil Procedure Before Trial § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

8. Communication from attorney Richard E. Guilford to California Law Revision Commission (October 28, 1996) (attached to Memorandum 97-77, on file with California Law Revision Commission).

1 legislation was to keep these proceedings out of court whenever possible and to
2 bring the law into line with practice.⁹

3 The 30-day period for a response to a demand for production of documents
4 under federal Rule 34 appears better designed to reduce unnecessary discovery
5 motions than the California rule. Moreover, adopting a 30-day period in California
6 for a response to a demand for production of documents would make that time
7 period the same as the 30-day period for a response to written interrogatories¹⁰ and
8 requests for admission.¹¹

9 The Commission recommends replacing the present 20-day period for a response
10 to a demand for production of documents with the 30-day period of federal Rule
11 34.

9. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975).

10. A response to written interrogatories must be within 30 days after service of the interrogatories unless otherwise provided by the court. Code Civ. Proc. § 2030(h).

11. A response to requests for admission must be within 30 days after service of the request unless otherwise provided by the court. Code Civ. Proc. § 2033(h).

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PROPOSED LEGISLATION

Code Civ. Proc. § 2031 (amended). Inspection of documents, things, and places

SECTION 1. Section 2031 of the Code of Civil Procedure is amended to read:

2031. (a) Any party may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, by inspecting documents, tangible things, and land or other property that are in the possession, custody, or control of any other party to the action.

(1) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(2) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

(3) A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.

(b) A defendant may make a demand for inspection without leave of court at any time. A plaintiff may make a demand for inspection without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions within five days after service of the summons on or appearance by, the party to whom the demand is directed, whichever occurs first. However, on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make an inspection demand at an earlier time.

(c) A party demanding an inspection shall number each set of demands consecutively. In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party. Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

(1) Designate the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection that is at least 30 days after service of the demand, or in unlawful detainer actions at least five days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date.

1 (3) Specify a reasonable place for making the inspection, copying, and
2 performing any related activity.

3 (4) Specify any related activity that is being demanded in addition to an
4 inspection and copying, as well as the manner in which that related activity will be
5 performed, and whether that activity will permanently alter or destroy the item
6 involved.

7 (d) The party demanding an inspection shall serve a copy of the inspection
8 demand on the party to whom it is directed and on all other parties who have
9 appeared in the action.

10 (e) When an inspection of documents, tangible things or places has been
11 demanded, the party to whom the demand has been directed, and any other party
12 or affected person or organization, may promptly move for a protective order. This
13 motion shall be accompanied by a declaration stating facts showing a reasonable
14 and good faith attempt at an informal resolution of each issue presented by the
15 motion.

16 The court, for good cause shown, may make any order that justice requires to
17 protect any party or other natural person or organization from unwarranted
18 annoyance, embarrassment, or oppression, or undue burden and expense. This
19 protective order may include, but is not limited to, one or more of the following
20 directions:

21 (1) That all or some of the items or categories of items in the inspection demand
22 need not be produced or made available at all.

23 (2) That the time specified in subdivision (h) to respond to the set of inspection
24 demands, or to a particular item or category in the set, be extended.

25 (3) That the place of production be other than that specified in the inspection
26 demand.

27 (4) That the inspection be made only on specified terms and conditions.

28 (5) That a trade secret or other confidential research, development, or
29 commercial information not be disclosed, or be disclosed only to specified persons
30 or only in a specified way.

31 (6) That the items produced be sealed and thereafter opened only on order of the
32 court.

33 If the motion for a protective order is denied in whole or in part, the court may
34 order that the party to whom the demand was directed provide or permit the
35 discovery against which protection was sought on terms and conditions that are
36 just.

37 The court shall impose a monetary sanction under Section 2023 against any
38 party, person, or attorney who unsuccessfully makes or opposes a motion for a
39 protective order, unless it finds that the one subject to the sanction acted with
40 substantial justification or that other circumstances make the imposition of the
41 sanction unjust.

42 (f) The party to whom an inspection demand has been directed shall respond
43 separately to each item or category of item by a statement that the party will

1 comply with the particular demand for inspection and any related activities, a
2 representation that the party lacks the ability to comply with the demand for
3 inspection of a particular item or category of item, or an objection to the particular
4 demand.

5 In the first paragraph of the response immediately below the title of the case,
6 there shall appear the identity of the responding party, the set number, and the
7 identity of the demanding party. Each statement of compliance, each
8 representation, and each objection in the response shall bear the same number and
9 be in the same sequence as the corresponding item or category in the demand, but
10 the text of that item or category need not be repeated.

11 (1) A statement that the party to whom an inspection demand has been directed
12 will comply with the particular demand shall state that the production, inspection,
13 and related activity demanded will be allowed either in whole or in part, and that
14 all documents or things in the demanded category that are in the possession,
15 custody, or control of that party and to which no objection is being made will be
16 included in the production.

17 Any documents demanded shall either be produced as they are kept in the usual
18 course of business, or be organized and labeled to correspond with the categories
19 in the demand. If necessary, the responding party at the reasonable expense of the
20 demanding party shall, through detection devices, translate any data compilations
21 included in the demand into reasonably usable form.

22 (2) A representation of inability to comply with the particular demand for
23 inspection shall affirm that a diligent search and a reasonable inquiry has been
24 made in an effort to comply with that demand. This statement shall also specify
25 whether the inability to comply is because the particular item or category has
26 never existed, has been destroyed, has been lost, misplaced, or stolen, or has never
27 been, or is no longer, in the possession, custody, or control of the responding
28 party. The statement shall set forth the name and address of any natural person or
29 organization known or believed by that party to have possession, custody, or
30 control of that item or category of item.

31 (3) If only part of an item or category of item in an inspection demand is
32 objectionable, the response shall contain a statement of compliance, or a
33 representation of inability to comply with respect to the remainder of that item or
34 category. If the responding party objects to the demand for inspection of an item or
35 category of item, the response shall (A) identify with particularity any document,
36 tangible thing, or land falling within any category of item in the demand to which
37 an objection is being made, and (B) set forth clearly the extent of, and the specific
38 ground for, the objection. If an objection is based on a claim of privilege, the
39 particular privilege invoked shall be stated. If an objection is based on a claim that
40 the information sought is protected work product under Section 2018, that claim
41 shall be expressly asserted.

42 (g) The party to whom the demand for inspection is directed shall sign the
43 response under oath unless the response contains only objections. If that party is a

1 public or private corporation or a partnership or association or governmental
2 agency, one of its officers or agents shall sign the response under oath on behalf of
3 that party. If the officer or agent signing the response on behalf of that party is an
4 attorney acting in that capacity for a party, that party waives any lawyer-client
5 privilege and any protection for work product under Section 2018 during any
6 subsequent discovery from that attorney concerning the identity of the sources of
7 the information contained in the response. The attorney for the responding party
8 shall sign any responses that contain an objection.

9 (h) Within ~~20~~ 30 days after service of an inspection demand, or in unlawful
10 detainer actions within five days of an inspection demand, the party to whom the
11 demand is directed shall serve the original of the response to it on the party
12 making the demand, and a copy of the response on all other parties who have
13 appeared in the action, unless on motion of the party making the demand the court
14 has shortened the time for response, or unless on motion of the party to whom the
15 demand has been directed, the court has extended the time for response. In
16 unlawful detainer actions, the party to whom the demand is directed shall have at
17 least five days from the date of service of the demand to respond unless on motion
18 of the party making the demand the court has shortened the time for the response.

19 (i) The party demanding an inspection and the responding party may agree to
20 extend the time for service of a response to a set of inspection demands, or to
21 particular items or categories of items in a set, to a date beyond that provided in
22 subdivision (h). This agreement may be informal, but it shall be confirmed in a
23 writing that specifies the extended date for service of a response. Unless this
24 agreement expressly states otherwise, it is effective to preserve to the responding
25 party the right to respond to any item or category of item in the demand to which
26 the agreement applies in any manner specified in subdivision (f).

27 (j) The inspection demand and the response to it shall not be filed with the court.
28 The party demanding an inspection shall retain both the original of the inspection
29 demand, with the original proof of service affixed to it, and the original of the
30 sworn response until six months after final disposition of the action. At that time,
31 both originals may be destroyed, unless the court, on motion of any party and for
32 good cause shown, orders that the originals be preserved for a longer period.

33 (k) If a party to whom an inspection demand has been directed fails to serve a
34 timely response to it, that party waives any objection to the demand, including one
35 based on privilege or on the protection for work product under Section 2018.
36 However, the court, on motion, may relieve that party from this waiver on its
37 determination that (1) the party has subsequently served a response that is in
38 substantial compliance with subdivision (f), and (2) the party's failure to serve a
39 timely response was the result of mistake, inadvertence, or excusable neglect.

40 The party making the demand may move for an order compelling response to the
41 inspection demand. The court shall impose a monetary sanction under Section
42 2023 against any party, person, or attorney who unsuccessfully makes or opposes
43 a motion to compel a response to an inspection demand, unless it finds that the one

1 subject to the sanction acted with substantial justification or that other
2 circumstances make the imposition of the sanction unjust. If a party then fails to
3 obey the order compelling a response, the court may make those orders that are
4 just, including the imposition of an issue sanction, an evidence sanction, or a
5 terminating sanction under Section 2023. In lieu of or in addition to that sanction,
6 the court may impose a monetary sanction under Section 2023.

7 (l) If the party demanding an inspection, on receipt of a response to an inspection
8 demand, deems that (1) a statement of compliance with the demand is incomplete,
9 (2) a representation of inability to comply is inadequate, incomplete, or evasive, or
10 (3) an objection in the response is without merit or too general, that party may
11 move for an order compelling further response to the demand. This motion (1)
12 shall set forth specific facts showing good cause justifying the discovery sought by
13 the inspection demand, and (2) shall be accompanied by a declaration stating facts
14 showing a reasonable and good faith attempt at an informal resolution of any issue
15 presented by it.

16 Unless notice of this motion is given within 45 days of the service of the
17 response, or any supplemental response, or on or before any specific later date to
18 which the demanding party and the responding party have agreed in writing, the
19 demanding party waives any right to compel a further response to the inspection
20 demand.

21 The court shall impose a monetary sanction under Section 2023 against any
22 party, person, or attorney who unsuccessfully makes or opposes a motion to
23 compel further response to an inspection demand, unless it finds that the one
24 subject to the sanction acted with substantial justification or that other
25 circumstances make the imposition of the sanction unjust.

26 If a party fails to obey an order compelling further response, the court may make
27 those orders that are just, including the imposition of an issue sanction, an
28 evidence sanction, or a terminating sanction under Section 2023. In lieu of or in
29 addition to that sanction, the court may impose a monetary sanction under Section
30 2023.

31 (m) If a party filing a response to a demand for inspection under subdivision (f)
32 thereafter fails to permit the inspection in accordance with that party's statement of
33 compliance, the party demanding the inspection may move for an order
34 compelling compliance.

35 The court shall impose a monetary sanction under Section 2023 against any
36 party, person, or attorney who unsuccessfully makes or opposes a motion to
37 compel compliance with an inspection demand, unless it finds that the one subject
38 to the sanction acted with substantial justification or that other circumstances make
39 the imposition of the sanction unjust.

40 If a party then fails to obey an order compelling inspection, the court may make
41 those orders that are just, including the imposition of an issue sanction, an
42 evidence sanction, or a terminating sanction under Section 2023. In lieu of or in

1 addition to that sanction, the court may impose a monetary sanction under Section
2 2023.

3 **Comment.** Subdivision (h) of Section 2031 is amended to permit 30 days for a response to a
4 demand for production of documents. This conforms Section 2031 to Rule 34 of the Federal
5 Rules of Civil Procedure, and makes the time period for a response to a demand for production of
6 documents the same as the 30-day period in California for a response to written interrogatories
7 and requests for admission. See Sections 2030(h), 2033(h).

8 If a party fails to respond to a request for production of documents, the court may prohibit the
9 party from introducing the documents in evidence. Section 2023(a)(4), (b)(3).
